Supreme Court, U.S.
FILED
AUG 2000

No. 00-1924

In The

Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS; E.R.B. and P.L.B., his wife,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Division Of The Superior Court Of New Jersey

RESPONDENTS' E.R.B. and P.L.B. BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

These Respondents take issue with Petitioner's identification of the parties, Pet. at iii, to the extent it was unnecessary since all the parties are listed in the caption, and because it contains argument, misstatements of fact, and inflammatory rhetoric. Rule 14(1)(a), (b).[1]

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[1] Pursuant to the requirements of Rule 15(2), these Respondents specifically reserve their right to continue to object to the dozens of misstatements of fact and law in the Petition. The critical misstatements of fact and law upon which this Response in Opposition relies are identified herein. These Respondents accept and rely upon the facts as found by the courts below; to the extent any fact offered in the Petition differs from the corresponding fact as found by the lower courts, these Respondents object to it.

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INTRODUCTION

The Case Below

After a thirteen day trial, the court below found that the Petitioner, an intelligent college student, had purposefully solicited a state licensed adoption agency to assist her placing her newborn for adoption, and that she had voluntarily signed a surrender of her parental rights and consent to the adoption. Pet., App. B at 48a-49a, 82a, 90a-94a. The day after she signed the documents waiving her parental rights, Petitioner told the agency caseworker that she was "pleased with her decision" and "at peace." Pet., App. B at 69a. Two weeks later, she had an attorney call these Respondents to tell them that she changed her mind and wanted her baby back. Pet., App. B at 70a. These Respondents declined to return the child and Petitioner brought an action in the Superior Court alleging fraud and duress. In a meticulously detailed seventy-two page opinion, the trial court found that the surrender was valid, the adoption agency had complied with all the statutory requirements for taking the surrender, the plaintiff was fully aware of the consequences of her actions at the time she signed the surrender, and that the surrender was valid and enforceable. Pet., App. B. The trial court soundly rejected her claims of fraud, duress, trickery and conspiracy, finding her testimony not "at all credible." Pet., App. B at 68a. On appeal, Petitioner challenged the trial court's findings of fact and also argued that the court had applied the wrong standard and burden of proof.

The Appellate Division affirmed the trial court's conclusions in all respects. Pet., App. A at 21a. As to the trial court's findings of fact, the Appellate Division went

beyond its customary acknowledgement of deference and stated that the trial judge's findings on the claims of fraud and duress "appear to be eminently supported by the record." Pet., App. A at 10a. The Appellate Division affirmed the trial court's holding that in order to rescind a voluntary waiver of parental rights, plaintiff must establish by a preponderance of the evidence that the adoption agency obtained the surrender by duress. Pet., App. A at 21a. The appellate court further observed that "the problem" with Petitioner's argument is that her action was to rescind a voluntary waiver of rights, and as such, fundamentally different from the cases in which the state moves to terminate a person's rights over their objection. Pet., App. A at 21a. Petitioner filed a Petition for Certification with the State Supreme Court, and it was denied. Pet. at 1.

The Petition

The Appellate Division got it right. Below, and here, Petitioner tries mightily to transform what is essentially a state law case into a federal constitutional one. To this end, the Petitioner wishes away the nature of the proceeding of which she voluntarily availed herself and she recasts the case as one involving an involuntary, state-initiated termination of parental rights. Further, she asks this Court to turn our civil law on its head by transferring the burden of proof on civil claims like fraud and duress from the proponent of the claim to the alleged perpetrator of the wrongful action. For all the reasons set forth below, this Honorable Court should reject Petitioner's analysis and leave this case where it has been addressed quite properly – in the state courts.

REASONS FOR DENYING THE WRIT

Summary of These Respondents' Reasons for Denying the Writ

Stripped of rhetoric, the Petitioner's questions reduce to two: (i) Must the clear and convincing standard of proof be applied to the review of a voluntary waiver of parental rights under a state adoption statute (Petitioner's Questions #s 1, 2, and 3), and (ii) Assuming the waiver was valid when made, should the State have permitted its revocation in the circumstances here presented (Petitioner's Question #4).

The first question need not be addressed by this Court because the holding of the case on which Petitioner relies, *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), does not speak to voluntary waivers of parental rights. It considers the standard of proof required of the government when the state proposes to terminate a parent's fundamental rights to his child over his clear objection. Even if the holding of *Santosky* could be extended to cases like this one where the parent voluntarily waives her fundamental rights and consents to the following state action, *Santosky* would not be controlling of this case. The reason is that the case below rested not only on the trial court's identification of the *standard* of proof, but on the court's recognition that the *burden* of proof lay with the plaintiff.

Petitioner urges that the trial court should have required the adoption agency to prove by clear and convincing evidence that her surrender was valid and uncoerced. Pet. at 2, 4. These Respondents are aware of no case, anywhere in the country, which holds that an adoption agency or individual bears the burden of proving the

absence of fraud and duress in a challenge to the validity of a voluntary surrender of parental rights. Indeed, in each of the cases cited by Petitioner, it was not the agency or the prospective adoptive parents, but the challenging birth parents who bore the burden of proving their allegations of fraud and duress. In this case, too, the court below properly assigned the burden of proof to the plaintiff, and it concluded that she had failed to satisfy even the lower preponderance of the evidence standard because, among other reasons, her testimony was not at all credible. Pet., App. B at 68a. The trial court's conclusions and the appellate court's affirmation were proper, and they are not inconsistent with this Court's holding in *Santosky v. Kramer*.

Petitioner's second question, like the first, disguises a matter of state law to look like a federal one. The time periods for making and withdrawing voluntary surrenders of parental rights are the product of considered legislative analysis in our State. The New Jersey Adoption Statute features numerous safeguards for the due process rights of birth parents, including the right not to surrender one's rights at all, and the provision that no waiver shall be deemed valid unless taken by a licensed agency or before a court at least seventy-two hours after the child's birth.[2] There is nothing in this Court's due process jurisprudence and certainly nothing in the Constitution which begs review of the State Legislature's decisions on this issue. Therefore, these Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

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[2] *N.J.S.A.* 9:3-41.

I.

THE STANDARD OF PROOF SET FORTH IN *SANTOSKY v. KRAMER* AND FOLLOWED IN *M.L.B. v. S.L.J.* DOES NOT APPLY HERE BECAUSE THIS CASE WAS NOT AN ADVERSARIAL TERMINATION PROCEEDING.

The Standard of Proof

These Respondents do not disagree that where the state initiates a proceeding to terminate parental rights over the parent's objection, the state bears a heavy burden to prove by clear and convincing evidence that the termination serves a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The clear and convincing evidence standard also applies where private citizens call upon the power of the state to terminate an objecting parent's rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

The strict standard of proof applied in *Santosky* and *M.L.B* is necessitated by the nature of the fundamental interest and by the relative imbalance of power and control between the state and the parent. Where the vastly superior powers of the state are brought to bear on an unwilling individual, the heightened standard of proof is required for the protection of the individual's due process rights. That is not the circumstance of this case, however. Here, the individual solicited the help of a state licensed adoption agency for the purpose of placing her child for adoption. While the agency was bound by statute to – and did – counsel Petitioner about the existence of options other than adoption, the trial court found that her focus throughout her relationship with the agency was on placing the child with an adoptive family and bringing to

a close her own parental obligations.[3] Petitioner herself initiated the termination of her parental rights by executing not only an agency surrender of those rights but a written consent to the statutory termination proceedings that she knew would follow. Pet., App. A. at 10a-11a. Although the State alone may enter an order terminating parental rights, it was Petitioner and not the State or any state actor which disabled her rights in the first place. The proceedings from which she seeks relief were voluntary and nonadversarial. In such a circumstance, it cannot be said that Petitioner was deprived of her liberty interests without due process.[4]

To be sure, Petitioner now expresses much dissatisfaction with the adoption agency and she claims to be bitterly unhappy about the decision she made. Her predicament does not, however, create a due process issue. The due process clause limits the state's ability to infringe fundamental rights, but it cannot require the state to ensure that those interests do not come to harm through

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[3] Specifically, the court found that Petitioner "made it very clear that she was not willing, even for a short period of time, to put off her personal school goals and parent the child herself." Pet., App. B at 93a. She was told of several alternatives to the relinquishment of her rights, but the court found it was she who eliminated all of them but adoption. Pet., App. B at 93a-94a.

[4] *See, In the Matter of the Adoption of Infant Boy Crews v. Hope Services*, 60 Wash. App. 202, 215, 803 P.2d 24, 32 (Wash. App. 1991), *aff'd* 118 Wash.2d 561, 574, 825 P.2d 305, 312 (Sup. Ct. 1992), (wherein the State's highest court held that where the State's procedures for voluntary terminations are followed and the plaintiff consents to the termination, there is no state action and due process is not implicated.). *See, also, In Re Adoption of Hernandez*, 25 Wash. App. 447, 452, 607 P.2d 879 (1980).

other means. *DeShaney v. Winnebago Cy. Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

If Petitioner believes, as she does, that harm came to her fundamental rights through other means in the form of wrongful coercion by the agency, then she has an adequate avenue of redress: a state civil action for fraud, duress, and undue influence. Her due process rights were protected by the availability of a state civil action to revoke her surrender. Her dissatisfaction with the results of that action cannot transform this case into one where state action demands a heightened standard of proof.

The Burden of Proof

It is not simply the standard of proof upon which Petitioner's scheme depends; she also argues that the burden of proof was wrongly assigned to her in the proceedings below. The Petition urges that the proponents of termination must bear the burden of proving by clear and convincing evidence that a parent's surrender was not obtained by fraud or duress. Pet. at 2, 4. This argument suffers two fatal flaws.

First, it is not supported by any case law. In each of the cases Petitioner cites it was the parent and not the agency or the proposed adoptive family who bore the burden of proving her allegations of fraud and duress.[5]

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[5] In *William D.A., Sr. v. Shawna Renee and Stephen Everett A.*, 1999 N.L. 1188850, at fn. 1 (W.Va.) the court cited the relevant statute as permitting an adoption to be set aside where "the person who executed the consent or relinquishment proves by clear and convincing evidence. . . . " In *In the Matter of a Female Child*, 85 Hawai'i 165, 938 P.2d 1184 (Int. Ct. App. HI 1997), the

Second, in the history of our civil law the burden of proof on claims of fraud and duress has been assigned consistently to the party alleging it. This is only logical since (as the Appellate Division wisely observed in this case) no one knows better than plaintiff whether she was subject to wrongful pressure. Pet., App. A at 18a. The plain language of the controlling statute also appears to require the parent to prove duress in a revocation action. *N.J.S.A.* 9:3-41(a); Pet., App. A at 19a. Moreover, it is practically impossible to prove a negative. In the balance of equities, it makes more sense to require the plaintiff to show that her will was overcome than it does to expect the beneficiary of her action to show that it was not wrongfully obtained.

When these intuitive elements of our civil law are considered alongside the sensible observation that no person or agency can force a parent to voluntarily relinquish a child,[6] it is obvious why this must be a state law case and not a federal one. It rests solely on the trial court's findings of fact and conclusions of law regarding whether the adoption agency properly discharged its

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appellate court affirmed the findings of the trial court which imposed on the objecting parent the burden of proving her allegations of fraud, undue influence or duress by clear and convincing evidence. Similarly, the court in *Meza v. Rodriguez*, 305 Ill. App. 777 (Ill. App. 1999) recognized the higher standard of proof in withdrawal-of-consent cases, but imposed it on the parent.

[6] *In the Matter of the Adoption of Infant Boy Crews v. Hope Protective Services*, 218, 803 P.2d 24, 34 (Wash. App. 1991), *aff'd*, 118 Wash.2d 561, 825 P.2d 305 (1992).

statutory duties and whether the plaintiff's will was overcome by wrongful conduct.

The trial court found that the agency substantially complied with numerous statutorily mandated safeguards, including (i) that it engage in at least three face-to-face meetings with the birth parent, (ii) that it fully explore the options available to her other than relinquishing her child, and (iii) that the parent know she can have legal counsel before making any decision about surrendering her child. Its findings are set forth with scrupulous citation to the record at Pet., App. B. at 74a-85a. Both of the lower courts observed correctly that the point of these procedures is to ensure the voluntariness of parental surrenders given to agencies. Where the procedures are substantially followed, the state has discharged its duty to ensure that actions taken thereunder are voluntary and the parent's right to due process is protected.

Here the trial court found that the agency was in substantial compliance with the statute and that Petitioner's surrender was voluntary. The Appellate Division affirmed, stating that the record supports the conclusion that plaintiff surrendered her child voluntarily and knowingly and in compliance with the pertinent statutory requirements. Pet., App. A at 17a.

Petitioner proposes not only to second-guess the lower court's findings of fact, but to reconfigure the State civil law so that in cases alleging fraud in the securing of waivers of parental rights, the burden of proof will rest not with the plaintiff but with the State. To hold as Petitioner urges, this Court would have to carve out an

exception to the existing civil law regarding the elements and proof of fraud, just for this type of family law case. In essence, the Court would have to "usher in a new regime of judicially prescribed, and federally prescribed family law."[7] The Court's historical solicitude for matters of state family law mitigates against its involvement in such an enterprise.[8]

II.

THE NEW JERSEY ADOPTION STATUTE IS NOT CONSTITUTIONALLY INFIRM BECAUSE IT DOES NOT PROVIDE FOR A PERIOD OF REVOCATION FOLLOWING A VOLUNTARY AGENCY SURRENDER.

Some states have enacted laws that provide for periods of reflection during which a birth parent may revoke her voluntary surrender of parental rights. No state supreme court has held that the Constitution requires this, and about half the states do not. Among those jurisdictions that do offer a post-surrender period of revocation, most impose certain restrictions on the right to revoke, in order to protect the newly formed

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[7] *Troxel v. Granville*, Scalia, J., dissenting, 530 U.S. 57, 91, 120 S.Ct. 2054, 2075, 147 L.Ed.2d 49 (2001). Cautioning against judicial involvement in making distinctions that have traditionally been the work of the state legislatures, Justice Scalia made the cogent observation that federal judges are likely to be no better at adjusting state law that state legislators are and it is far better to leave the mistake-making to the legislators because they can correct their mistakes relatively quickly, and if they fail to, they can be removed by the people. *Id.*

[8] *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 506, 15 L.Ed.2d 404 (1966).

family from anything but the most meritorious challenges. A significant number of states do *not* recognize the right to revoke after a voluntary surrender where the child has already been placed in an adoptive home.[9] Others recognize a period of revocation in private or independent (i.e., not supervised by licensed agencies) adoptions, but not where the surrender is taken by a licensed agency, and where, presumably, there exist procedural safeguards to ensure the voluntariness of the parent's action.[10]

Whether to allow a post-surrender period of revocation and if so how long and under what circumstances, is a matter for the states' lawmaking bodies to determine. Each state legislature must consider the construction of its adoption statute as a whole, and determine whether it offers sufficient protection for the rights of the parties involved.

The New Jersey Legislature has devoted much attention to its adoption statute, and it has determined not to include a period of reflection beyond what we already have.[11] Specifically, the Legislature enacted comprehensive amendments to the adoption statute in 1994 and

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[9] *See, e.g.*, Fl. Stat. § 63.082.

[10] *See, e.g. Il. St. Ch.* 750 § 50/9, 50/11.

[11] *N.J.S.A.* 9:3-41(e) states that no surrender of parental rights shall be valid if taken sooner that 72 hours after birth. Thus, all parents have at least three days to consider their decision. Surrenders taken by licensed agencies any time after that are irrevocable except upon proof of fraud. *N.J.S.A.* 9:3-41(a). The Petitioner attempts to grab this Court's attention by asserting that New Jersey is in the minority on this. She asserts that most other jurisdictions either provide for a pre-surrender judicial review or provide for a period of revocation.

1998. Among the sections amended were those addressing the rights of birth fathers to object to adoptions. Prior to the 1998 amendments, biological fathers could come forward and contest adoptions at any time they learned of the fact of their child's birth, up to the finalization of the adoption. The spectre of a formerly unknown or unidentified birth father appearing to claim his parental rights and disrupting an adoptive placement was a source of insecurity for prospective adoptive families and was the subject of a number of difficult cases in New Jersey and elsewhere.[12] Largely in response to cases like these, the Legislature amended the adoption statute to shorten the time period available to a biological parent to claim and defend his parental rights.[13] If the Legislature had been inclined to speak more or differently about the opportunities for biological mothers to reclaim their rights after a voluntary surrender, or if it had seen a need to provide for a cooling off period beyond what we already have, this would have been the time to do it.

Pet. at 27. Her information is incorrect. New Jersey does provide for a judicial surrender in which the court examines the birth parent and makes factual findings supporting (or not) the surrender. *N.J.S.A.* 9:3-45(b)(2). This is an alternative procedure under the statute.

[12] *See, e.g., In the Matter of the Adoption of a Child by P.F.R. and V.A.I.*, 308 N.J. Super. 250, 705 A.3d 1233 (App. Div. 1998).

[13] *N.J.S.A.* 9:3-45.1. *See, also, In the Matter of the Adoption of Children by G.P.B., Jr.*, 161 N.J. 396, 404, 736 A.3d 1277 (1999) (in which the state Supreme Court analyzed both the 1994 and 1998 amendments to the adoption statute as being enacted in response to the public and courts' growing impatience with the preservation of parental rights over the rights of children to stability and finality).

By leaving those provisions intact, the Legislature affirmed its commitment to the irrevocability of agency surrenders, as well as its commitment to a period of not less than three days before any surrender can take place. The intent of the State Legislature is clear on the issue of whether Petitioner ought to have been afforded a period of revocation following her voluntary surrender, and this Honorable Court should decline the Petitioner's invitation to inject itself into the State's public policymaking.[14]

III.

NEW JERSEY'S ADOPTION STATUTE IS CONSTITUTIONALLY SOUND AND NEEDS NO REVIEW BY THIS COURT ON THE ISSUES PETITIONER RAISES.

Fueling much of Petitioner's argument is her belief that the courts below have distorted the statute and case law to deprive her of her rights, contrary to what she says is the State's policy of keeping mothers and children together in the absence of proof that the parent is unfit. Pet. at 19. Respectfully, it is she who distorts the law.

It is not true, as she asserts, that New Jersey recognizes a commitment to resolve all doubts against the destruction of the relationship between parents and their

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[14] Significantly, the Petition offers no suggestions about how much time the Constitution might have required this parent to be given to change her mind. It is a reasonable inference that Petitioner perceives the complexity of the judgment the Legislature would have had to grapple with, if not the conclusion that one court observed, that is: "For the parent who changes his or her mind, no time period would be long enough." *Crews*, 60 Wash. App. 202, 218, 803 P.2d 24, 34 (1991).

children except in cases of unfitness. *Id.* Our law has evolved considerably since *In the Matter of Baby M.*, 109 N.J. 296, 537 A.2d 1227 (1988). We now take a longer and more compassionate look at the rights of children, including those who find stability in adoptive homes.[15]

Key to our commitment to all parties to adoption is the availability of an irrevocable agency surrender. No parent is forced to avail herself of this procedure, but for those who do, it comes as close as anything can to guaranteeing that a surrender of parental rights is truly voluntary. It protects the birth parent's rights by affording her the opportunity for psychological counseling and representation by counsel, and it lets her know that she has options other than surrendering her child. Once it is undertaken, a proper agency surrender assures the newly formed family that it can grow and develop as freely as any family, without the threat of disturbance that can follow a surrendering parent's change of heart or circumstance. Most important, the agency surrender ensures that an adopted child will be secure in her new home. The State has a compelling interest in protecting the right of children to be secure in adoptive placements; its legislative determination to make agency surrenders irrevocable supports that interest.

Contrary to the draconian picture Petitioner tries to paint, this law does not slam shut the door of freedom for

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[15] *See, e.g., In the Matter of the Adoption of Children by G.P.B., Jr., supra,* at n. 13; *In the Matter of the Guardianship of D.M.H., C.L.H.W., L.F.H., and R.Q.H.*, 161 NJ 365, 736 A.2d 1261 (1999), and *In the Matter of the Guardianship of K.H.O.*, 161 NJ 337, 736 A.2d 1246 (1999).

anyone. It balances the freedoms of the most important people in our society – parents and children. It does so with compassion and an overriding commitment to the security of children in their families. It is the product of socially and constitutionally sound reasoning and needs no review by this Court.

CONCLUSION

Wherefore, for all of the reasons set forth herein, these Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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